Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979
No. 79-432

EL CAMINO COMMUNITY COLLEGE DISTRICT and STUART E. MARSEE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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September 14, 1979

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IN THE

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EL CAMINO COMMUNITY COLLEGE DISTRICT and STUART E. MARSEE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners El Camino Community College District and Stuart E. Marsee respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 21, 1979.

Opinion Below.

The opinion of the Court of Appeals for the Ninth Circuit, not yet reported, appears in the Appendix hereto, pp. 7a-12a. The findings of fact and conclusions of law of the District Court for the Central District of California, reported at 454 F. Supp. 825 (1978), appear in the Appendix hereto, pp. 15a-30a. The unreported judgment of the District Court for the Central District of California appears in the Appendix hereto, pp. 31a-32a.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 21, 1979, affirming the judgment of the District Court for the Central District of California entered July 28, 1978. A timely petition for rehearing was denied on August 9, 1979; the order appears in the Appendix hereto, p. 13a. On August 24, 1979, the Court of Appeals entered its order staying issuance of mandate until September 16, 1979; the order appears in the Appendix hereto, p. 14a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented.

Are the administrative regulations promulgated by HEW (45 C.F.R. Part 80) in excess of statutory authority granted by Title VI of the Civil Rights Act of 1964 (42 U.S.C. §2000d, *et seq.*), and therefore invalid, in that they authorize HEW:

(1) to investigate a recipient's general employment practices which receive no Federal financial assistance or where a primary objective of the Federal financial assistance is not to provide employment?

(2) to investigate a recipient's general educational programs or activities which receive no Federal financial assistance?

Statutes and Regulations Involved.

The following statutes and regulations involved in this case are set forth in the Appendix hereto, pp. 1a-6a.

(1) Civil Rights Act of 1964, Title VI: section 601, 42 U.S.C. §2000d; section 602, 42 U.S.C. §2000d-1; and section 604, 42 U.S.C. §2000d-3.

(2) Code of Federal Regulations, Title 45, Part 80: section 80.3(c); section 80.4(d); section 80.6(c); and section 80.7(c).

Statement of the Case.

The facts in this case are not in dispute. Petitioners are the El Camino Community College District, a public community college district organized and operated pursuant to the laws of California, and Stuart E. Marsee, its District Superintendent, College President, and Secretary to the Board of Trustees (collectively the College).

On February 3, 1965, Marsee executed on behalf of the College an "Assurance of Compliance with the Department of Health, Education, and Welfare Regulations Under Title VI of the Civil Rights Act of 1964." R. 85, 239. The "Assurance of Compliance" is set forth in the Appendix hereto, pp. 33a-34a.

The College receives Federal financial assistance for specified programs and activities it conducts and maintains.[1] R. 73-75, 238.

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[1]By affidavit filed January 13, 1978, Marsee stated that the College received Federal financial assistance during the 1976-77 and 1977-78 fiscal years for such particular programs or activities as Nurse Student Loans; Nursing Capitation; College Library Resources; Basic and Supplemental Education Opportunity Grants; Higher Education Work Study; National Direct Student Loans; Vocational Education for Basic Grants to States, for Consumer and Homemaking, for Special Needs, and for Work Study; Veterans Cost of Instruction Program; and Comprehensive Employment and Training Program. R. 73-74.

These facts were not controverted by the United States below. R. 172-173.

On October 5, 1973, the Department of Health, Education and Welfare (HEW) received a complaint and other information from the "Council of Chicano Organizations" alleging that the College utilized discriminatory practices and procedures against Spanish-surnamed individuals in the delivery of education services and in employment. R. 88-90, 239. In June, 1974, representatives of HEW contacted the College for the purpose of investigating the allegations of discrimination and determining whether the College was in compliance with Title VI of the Civil Rights Act of 1964 and the Title VI regulations promulgated by HEW. R. 239.

At various times between June, 1974, and April, 1975, HEW sought detailed information regarding employment applications for, minority recruitment of, and selection of the College's Dean of Counseling, Dean of Women, Art Instructor, Educational Services position, and Dean of Personnel; detailed information regarding the College's student recruitment policies, outreach student recruiting efforts, and student financial aid programs; the procedures for transmission of information to the College's Board of Trustees; the racial and sexual composition of the Board; and whether or not the Board had a citizen's advisory committee on matters such as minority affairs. R. 76, 86-87, 91-94. By letter dated April 1, 1975, HEW summarized its past attempts to investigate the 1973 complaint and again requested information regarding the College's employment practices and educational programs. R. 97-101. The letter is set forth in the Appendix hereto, pp. 35a-40a.

The College's position with respect to each of the requests for information by HEW, as communicated

by Marsee on May 9, 1975, was that the College objected to the totally broad-based requests for information which HEW had directed at it, that it was incumbent on HEW to address its investigation to particular Federally assisted programs or activities at the College, and that the College would cooperate fully with any reasonable requests by HEW for information regarding such Federally assisted programs or activities. R. 104-105.

No further action was taken by HEW until April 22, 1977, when HEW again sought the far-reaching information it had earlier requested; on April 29, 1977, HEW was informed on behalf of the College that the College's earlier position remained unchanged. R. 81-82, 110-113. Thereafter, the College was informed by HEW that the question of the College's alleged noncompliance with Title VI was being referred to HEW's regional attorney and the Department of Justice for enforcement.

On December 12, 1977, respondent United States filed a complaint for injunction and declaratory relief on behalf of HEW against the College. The jurisdiction of the district court was invoked under 28 U.S.C. §1345 and 42 U.S.C. §2000d-1. Respondent's complaint sought a declaration that the College's refusal to grant HEW access to information and data regarding education services and employment practices of the College violates Title VI, the regulations promulgated by HEW under Title VI, and the Assurance of Compliance executed on behalf of the College; and an injunction of the College from failing or refusing to permit HEW access to the data, records, and other information of the College pertinent and necessary to enable HEW to ascertain whether the College is in compliance with

Title VI and the Title VI regulations promulgated by HEW. Thereafter, HEW moved for preliminary injunction.

In response, the College moved for dismissal of the complaint or, in the alternative, for summary judgment, on the ground that HEW's powers and authority under Title VI and Title VI regulations are limited to programs or activities, or parts thereof, which receive Federal financial assistance.

The district court consolidated the entire matter as a motion for summary judgment and as a matter for permanent injunction and declaratory relief. After consideration, the district court denied the College's motion for summary judgment and granted the permanent injunction and declaratory relief as prayed by the United States. The district court's judgment was entered on July 28, 1978, and the College immediately appealed to the Court of Appeals for the Ninth Circuit. The district court's judgment was affirmed on June 21, 1979, and the College's petition for rehearing was denied on August 9, 1979.

REASONS FOR GRANTING THE WRIT.

1. HEW's Authority to Investigate Is Limited by Title VI to Federally Financed Programs or Activities.

The issues presented are important and significant because HEW's Title VI regulations which authorize investigation of programs or activities receiving no Federal financial assistance violate the long-established principle that the authority of an administrative agency is delineated by the statutory grant. HEW has power only to adopt regulations to carry into effect the will of Congress as expressed in Title VI. *Cf. Dixon v. United States,* 381 U.S. 68. To permit otherwise effectively obliterates the distinctions between the legislative and the executive branches of government and thwarts the will of the people as expressed by their elected representatives. And certainly, when the purpose of the investigation is not merely to get information but is to produce a regulatory result, as herein, the power of investigation is necessarily limited by the statutory grant and the power of regulation. 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE 210-211 (1958).

Title VI does not explicitly authorize HEW investigatory or enforcement power with respect to non-federally financed programs or activities; section 604 explicitly provides that *no action* is authorized with respect to employment activities except where a primary objective of the Federal financial assistance is to provide employment. HEW's rule-making authority pursuant to section 602 is limited to effectuating the objectives of Title VI as they relate to discrimination in federally-financed programs or activities.

Nor does Title VI implicitly authorize HEW investigatory or enforcement power with respect to non-

federally financed programs or activities in light of the extensive congressional history surrounding the enactment of Title VI which suggests that Congress intentionally drafted the statute to exclude employment practices and regulatory and enforcement power in non-federally financed programs or activities. *See,* 110 CONG. REC. 7059 (comments of Senator Pastore), 7066-7067 (comments of Senator Ribicoff), 10076 (letter from Attorney General Kennedy to Senator Cooper).

Nonetheless, the district court concluded, and the court of appeals affirmed, that the Title VI regulations authorize HEW to investigate non-federally assisted programs and activities and employment practices to determine whether there is any discrimination in those programs or activities which affect beneficiaries of federally-assisted programs or activities in a discriminatory manner. HEW's Title VI regulations clearly authorize such investigation of non-federally assisted programs and employment practices. 45 C.F.R. §80.3 (c)(3) (employment practices where a primary objective of the Federal financial assistance is not to provide employment); §80.4(d) (assurance of compliance extends to admission practices and to all other practices relating to the treatment of students); §80.6(c) (access to sources of information); §80.7(c) (investigation includes review of practices and policies of recipient and of other relevant factors).

In view of the statutory language of Title VI and the congressional history and intent underlying such language, HEW's administrative regulations which authorize investigation of non-federally financed programs and activities and employment practices are in excess of HEW's statutory authority under Title VI and are therefore invalid.

2. The Investigation Proposed by HEW Is Extremely Costly and Time-Consuming.

The issues presented are important and significant because HEW's investigation of non-federally financed programs and activities and employment practices are extremely costly and time-consuming. In her opinion below, Circuit Judge Hufstedler accurately noted,

> "We are not unsympathetic to the frustrations of college officials faced with demands by HEW officials for massive amounts of information, much of which may ultimately prove useless, and at least some of which may prove to be none of the agency's business. As anyone knows who is familiar with the costs of discovery in civil cases, gathering and collating of information, such as that sought by HEW in this case, is extremely costly and time-consuming. All institutions of higher education operate under severe budgetary constraints and many of them are suffering financial crises caused by very high fixed costs, spiraling inflation, and changed demographics."

When considered in the context of the multitude of schools and colleges, cities, counties, states, and other public agencies throughout the country which receive Federal financial assistance for particular programs and activities, the costs of such peripheral investigations become staggering and the drain on federal investigative resources enormous. The costs are even more extreme and disproportionate for California public entities in which public revenues have been severely restricted as the result of the passage of a revenue limitation initiative (Proposition 13) on June 6, 1978.

If HEW is to have such virtually unlimited investigatory power with its attendant costs and burdens for

all recipients of Federal financial assistance, Congress should so provide explicitly by statute. The judiciary should be reluctant to infer such investigatory power in light of Title VI's congressional history.

3. HEW's Investigation of Non-Federally Financed Programs and Activities Intrudes Upon State and Local Educational Programs.

The issues presented are important and significant because of the unwarranted intrusion of HEW's investigatory practices upon local public agencies. While HEW unquestionably has a legitimate interest in eliminating discrimination in programs or activities to which it distributes federal grants and administers financial assistance, such interest should end where the federal funds end.

Taken to their logical extreme, HEW's infection theory arguments in favor of broad investigatory power would lead to full-scale investigation of every program or activity, regardless of funding or control, if even so much as a dollar of Federal financial assistance were provided to any program or activity within a state or political subdivision. This power of unlimited investigation was hardly authorized by Congress during the enactment of Title VI.

The Court has recognized the undisputed interest which states and their school districts have in public educational programs and services. *Cf. San Antonio Independent School District v. Rodriguez,* 411 U.S. 1. To extend federal investigatory power to state and local programs for which no Federal financial assistance is provided is to call into question programs or activities over which HEW has no control and about which it has no business. Such overbroad investigation will

undoubtedly lead to federal administrators and investigators making decisions over matters of local educational concern which they are not competent, qualified, or elected to make. The management and control of, and responsibility for, non-federally financed programs or activities should remain with the local public officials who operate the programs or activities.

This does not mean that the College is free to discriminate on the basis of race, color, or national origin in its non-federally financed programs or activities, because it clearly may not. Both the United States Constitution (U.S. CONST. amend. XIV) and the California Constitution (CAL. CONST. art. I, §7(a)) prohibit such discrimination. These constitutional protections are buttressed by federal statutes (42 U.S.C. §1981, 42 U.S.C. §1983, 42 U.S.C. §2000e) and by state laws (Cal. Gov. Code §11135, Cal. Labor Code §1420(a)).

This Court should be reluctant to permit HEW to conduct investigations of education programs or activities and employment practices unless HEW provides federal monies for such programs, activities, or practices.

4. The Decision Below Conflicts With Decisions of Other Courts of Appeals Regarding HEW's Power to Investigate Non-Federally Financed Employment Practices Under Virtually Identical Provisions of Title IX.

In the cases of *Isleboro School Committee v. Califano,* 593 F.2d 424 (1st Cir. 1979), *Junior College District of St. Louis v. Califano,* 597 F.2d 119 (8th Cir. 1979), and *Romeo Community Schools v. U.S. Department of Health, Education and Welfare,* ..... F.2d ..... (6th Cir. June 20, 1979), the courts of

appeals construed provisions of Title IX of the Education Amendments of 1972, 20 U.S.C. §1681, *et seq.*,[2] to prohibit HEW's employment-related regulations found at 45 C.F.R. Part 86. Several district courts have also concluded that HEW is without authority to issue employment-related regulations under Title IX. *University of Toledo v. HEW*, 464 F. Supp. 693 (N.D. Ohio 1979) (regulations are void and unenforceable because not authorized by section 1681); *Dougherty County School System v. Califano*, Civ. Action No. 78-30-ALB (N.D. Ga. Aug. 22, 1978) (Title IX does not authorize HEW to promulgate regulations relating to employment); *Seattle University v. HEW*, No. C77-631S (W.D. Wash. Jan. 3, 1978) (regulations are overbroad and exceed the scope of authority granted to HEW under Title IX).

In view of this Court's recognition that Title IX was patterned after Title VI and that both statutes provide the same administrative mechanism for terminating Federal financial support for institutions engaged in prohibited discrimination (*Cannon v. University of Chicago*, 99 S.C. 1946), it is difficult to conceive of justification for HEW's employment-related regulations under Title VI, especially where section 604 expressly prohibits federal action regarding employment practices. Furthermore, the courts' rationale for invalidating HEW's employment-related regulations would

[2]The operative language is found in §1681(a): "(a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that . . . ." Nine exceptions are listed, which refer generally to activities of institutions and organizations which have traditionally offered admission or membership only to persons of one sex.

seem to support an attack on HEW's regulations related to non-federally financed education programs. This Court should resolve the apparent conflict.

5. The College Challenged the Validity of HEW's Regulations Below.

Both the district court and the court of appeals herein concluded that the College had not challenged the validity of HEW's regulations and that the sole issue to be decided was whether HEW is prevented from seeking information about programs or activities receiving no federal assistance. This semantic recharacterization of the issues is not justified.

The College's position in presenting its motion for summary judgment was that Title VI did not authorize regulations related to non-federally financed programs or activities or employment practices and that the congressional history behind Title VI supported this interpretation. R. 133-145, 270-279. The College noted that HEW's regulatory authority was limited by the provisions of Title VI. R. 146. In its findings, the district court stated,

> "Defendants contend that the Office for Civil Rights is authorized to investigate the programs or activities for which defendant El Camino Community College District receives federal financial assistance through the Department of Health, Education and Welfare, but it is not authorized to investigate beyond the federally assisted programs or activities in order to determine whether the defendants or El Camino College are in compliance with Title VI.
>
> "The defendants further contend that the authority of the Office for Civil Rights to investigate

the employment practices at El Camino College is limited to investigation of the employment practices in the federally assisted programs or activities where the primary objective of the federal financial assistance is to provide employment.

"Another contention of the defendants is that the Office for Civil Rights exceeded the scope of its investigative authority under Title VI by not limiting its investigation to the federally assisted programs or activities."

On appeal, the College made the same arguments and used the same materials it had used in the district court. The court of appeals apparently considered the matters to have been raised on appeal, albeit for the first time according to Circuit Judge Hufstedler's opinion.

The College believes that the issue of the validity of HEW's Title VI regulations was properly raised below and may now be reviewed by this Court.

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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September 14, 1979

APPENDIX.

Statutes and Regulations Involved.
Civil Rights Act of 1964, Title VI,
42 U.S.C. § 2000d, et seq.

§ *2000d*. No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

§ *2000d-1*. Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or

(2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

§ *2000d-3*. Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

Code of Federal Regulations, Title 45, Part 80.

§ *80.3 Discrimination prohibited.*

. . . .

(c) *Employment practices.* (1) Where a primary objective of the Federal financial assistance to a program to which this regulation applies is to provide employment, a recipient may not (directly or through contractual or other arrangements) subject an individual to discrimination on the ground of race, color, or national origin in its employment practices under

such program (including recruitment or recruitment advertising, employment, layoff or termination, upgrading, demotion, or transfer, rates of pay or other forms of compensation, and use of facilities), including programs where a primary objective of the Federal financial assistance is (i) to reduce the employment of such individuals or to help them through employment to meet subsistence needs, (ii) to assist such individuals through employment to meet expenses incident to the commencement or continuation of their education or training, (iii) to provide work experience which contributes to the education or training of such individuals, or (iv) to provide remunerative activity to such individuals who because of handicaps cannot be readily absorbed in the competitive labor market. The following, under existing laws, have one of the above objectives as a primary objective:

(*a*) Projects under the Public Works Acceleration Act, Public Law 87-658, 42 U.S.C. 2641-2643.

(*b*) Work-study under the Vocational Education Act of 1963, as amended, 20 U.S.C. 1371-1374.

(*c*) Programs assisted under laws listed in Appendix A as respects employment opportunities provided thereunder, or in facilities provided thereunder, which are limited, or for which preference is given, to students, fellows, or other persons in training for the same or related employments.

(*d*) Assistance to rehabilitation facilities under the Vocational Rehabilitation Act, 29 U.S.C. 32-34, 41a and 41b.

(2) The requirements applicable to construction employment under any such program shall be those specified in or pursuant to Part III of Executive Order 11246 or any Executive order which supersedes it.

(3) Where a primary objective of the Federal financial assistance is not to provide employment, but discrimination on the ground of race, color, or national origin in the employment practices of the recipient or other persons subject to the regulation tends, on the ground of race, color, or national origin, to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program to which this regulation applies, the foregoing provisions of this paragraph (c) shall apply to the employment practices of the recipient or other persons subject to the regulation, to the extent necessary to assure equality of opportunity to, and nondiscriminatory treatment of, beneficiaries.

. . . .

§ *80.4 Assurances required.*

. . . .

(d) *Assurance from institutions.* (1) In the case of any application for Federal financial assistance to an institution of higher education (including assistance for construction, for research, for special training project, for student loans or for any other purpose), the assurance required by this section shall extend to admission practices and to all other practices relating to the treatment of students.

(2) The assurance required with respect to an institution of higher education, hospital, or any other institution, insofar as the assurance relates to the institution's practices with respect to admission or other treatment of individuals as students, patients, or clients of the institution or to the opportunity to participate in the provision of services or other benefits to such individuals, shall be applicable to the entire institution unless

the applicant establishes, to the satisfaction of the responsible Department official, that the institution's practices in designated parts or programs of the institution will in no way affect its practices in the program of the institution for which Federal financial assistance is sought, or the beneficiaries of or participants in such program. If in any such case the assistance sought is for the construction of a facility or part of a facility, the assurance shall in any event extend to the entire facility and to facilities operated in connection therewith.

§ *80.6 Compliance information.*

. . . .

(c) *Access to sources of information.* Each recipient shall permit access by the responsible Department official or his designee during normal business hours to such of its books, records, accounts, and other sources of information, and its facilities as may be pertinent to ascertain compliance with this part. Where any information required of a recipient is in the exclusive possession of any other agency, institution or person and this agency, institution or person shall fail or refuse to furnish this information the recipient shall so certify in its report and shall set forth what efforts it has made to obtain the information. Asserted considerations of privacy or confidentiality may not operate to bar the Department from evaluating or seeking to enforce compliance with this Part. Information of a confidential nature obtained in connection with compliance evaluation or enforcement shall not be disclosed except where necessary in formal enforcement proceedings or where otherwise required by law.

. . . .

§ *80.7 Conduct of investigations.*

. . . .

(c) *Investigations.* The responsible Department official or his designee will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part. The investigation should include, where appropriate, a review of the pertinent practices and policies of the recipient, the circumstances under which the possible noncompliance with this part occurred, and other factors relevant to a determination as to whether the recipient has failed to comply with this part.

. . . .

Opinion.

United States Court of Appeals, for the Ninth Circuit.

United States of America, Plaintiff-Appellee, v. El Camino Community College District and Stuart E. Marsee, Defendants-Appellants. No. 78-2720.

Appeal from the United States District Court
for the Central District of California.

Filed: June 21, 1979.

Before: CHAMBERS and HUFSTEDLER, Circuit Judges, and SOLOMON,* District Judge.

HUFSTEDLER, Circuit Judge:

The Government brought this suit to compel El Camino Community College District ("College") and its President and District Superintendent, Marsee, to supply the Office for Civil Rights ("OCR") of the Department of Health, Education and Welfare ("HEW") with information about the composition of the College's workforce and student body, its recruiting and hiring procedures for academic and other positions, its student recruiting procedures, and its financial and academic assistance programs for students. The College declined the request unless the request was limited to federally-assisted programs or activities. OCR refused to limit its request, efforts to secure voluntary compliance failed, and the Department of Justice filed this complaint seeking a declaratory judgment that the College's refusal to comply with the request for information violated Title VI. The Government sought a declaratory judgment and an injunction. Following cross-motions for summary judgment, the district court

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*Honorable Gus J. Solomon, Senior United States District Judge, District of Oregon, sitting by designation.

granted a permanent injunction and declaratory relief. The College and Marsee appeal.[1]

On appeal the College argues that the administrative regulations promulgated by HEW (45 C.F.R. Part 80) were in excess of the statutory authority granted by Title VI of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000d, *et seq.*) because the regulations purport to authorize the agency to investigate educational programs, activities, and general employment practices of the College which do not receive federal financial assistance. Because the College did not challenge the validity of the regulations below, it cannot do so for the first time on appeal. Our review is limited to the only question properly raised below: Do the statutes and regulations prevent HEW from seeking information about programs or activities receiving no federal assistance?

The College operates a public community college located in Torrance, California, which receives federal financial assistance for some of its programs. In October, 1973, OCR began an investigation of a complaint that the College discriminated against Spanish surnamed persons in employment and educational services. OCR requested information about the racial and sexual composition of the College's workforce and student body, about its recruiting and hiring procedures, and its programs for granting financial and academic assistance to students.

Title VI of the 1964 Civil Rights Act prohibits discrimination on the basis of race, color or national origin under any program or activity receiving federal

[1]Hereafter the College and Dr. Marsee will be referred to collectively as "College."

financial assistance. (42 U.S.C. § 2000d.) Under regulations promulgated by HEW to enforce Title VI, OCR is directed to conduct investigations to ascertain possible failures to comply with Title VI. (45 C.F.R. § 80.7 (c).) Each recipient of federal funds is required to give access to OCR's officials to its "books, records, accounts, and any other sources of information, and its facilities as may be pertinent to ascertain compliance. . . ." (45 C.F.R. § 80.6(c).)

The regulation that strikes to the heart of the College's contentions is the requirement that every applicant for federal financial assistance through HEW must execute an assurance of compliance with HEW's regulations imposing virtually an open-file examination of all of the applicant's records and programs. The pertinent regulations provide:

> "(1) In the case of any application for Federal financial assistance to an institution of higher education (including assistance for construction, for research, for special training project, for student loans or for any other purpose), the assurance required by this section shall extend to admission practices and to all other practices relating to the treatment of students.
>
> "(2) The assurance required with respect to an institution of higher education . . . insofar as the assurance relates to the institution's practices with respect to admission or other treatment of individuals as students . . . or to the opportunity to participate in the provision of services or other benefits to such individuals, shall be applicable to the entire institution unless the applicant establishes, to the satisfaction of the responsible Department official, that the institution's practices

in designated parts or programs of the institution will in no way affect its practices in the program of the institution for which Federal financial assistance is sought, or the beneficiaries of or participants in such programs." (45 C.F.R. § 80.4(d).)

The College executed the required assurance of compliance on February 3, 1965. By their plain language, the regulations require the applicant to furnish information about the entire institution unless the institution successfully carries its burden of showing that the information "will in no way affect its practices in the program of the institution for which federal financial assistance is sought, or the beneficiaries of or participants in such programs." The College did not carry the heavy burden placed upon it by the regulations. Indeed, the College did not try to show that non-federally funded activities and practices could not affect its federally funded programs.

In exercising its investigatory powers, as distinguished from its regulatory or remedial powers, HEW must have substantial latitude in scrutinizing policies and practices of the institution that may have a discriminatory impact on the intended beneficiaries of assistance.[2] For example, if the institution received federal funds under the National Direct Student Loan Program and made those benefits available on an equal basis to all of its students, but the institution refused to admit Spanish surnamed students, potential beneficiaries of

[2]Regulations promulgated to effectuate the agency's regulatory and remedial powers have little relevance in interpreting regulations governing the investigatory powers. Thus, contrary to the College's argument, regulations promulgated to enforce § 602 (42 U.S.C. § 2000d-1) provide no guidance in construing regulations designed to implement the agency's investigatory powers.

the federally funded program would have been denied benefits on the basis of their race. An investigation solely of the administration of the loan program would not reveal the violation.

On the record before us, we have no occasion to decide what information would be relevant to the agency's investigation, what information, if any, would be privileged, or the extent to which, if at all, the agency regulations go beyond the statutory authority committed to the agency.

We are not unsympathetic to the frustrations of college officials faced with demands by HEW officials for massive amounts of information, much of which may ultimately prove useless, and at least some of which may prove to be none of the agency's business. As anyone knows who is familiar with the costs of discovery in civil cases, gathering and collating of information, such as that sought by HEW in this case, is extremely costly and time-consuming. All institutions of higher education operate under severe budgetary constraints and many of them are suffering financial crises caused by very high fixed costs, spiraling inflation, and changed demographics.

Our review of this record suggests to us that an employee of OCR, who initially launched this investigation, was insensitive to the legitimate concerns of the College. His conduct may have produced an atmosphere of such antipathy that voluntary compliance thereafter became practicably impossible. Nevertheless, we cannot excuse the College for its failure to comply with the regulations that it accepted in obtaining federal funding, nor can we excuse it from making a record that would support its refusal to do so. All we can do

is to ask both the Government and the College to exercise both restraint and good judgment in trying to achieve the ends upon which all parties agree—the highest quality education at the least costly price entirely free from any discriminatory taint.[3]

AFFIRMED.

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[3]We are aware of the decisions in Isleboro School Committee v. Califano (1st Cir. 1979) ..... F.2d ..... [No. 78-1302/1304, Mar. 9, 1979] and Junior College District of St. Louis v. Califano (8th Cir. 1979) ..... F.2d ..... [No. 78-1830, Apr. 19, 1979]. Neither case is of assistance here. In both *Isleboro* and *Junior College,* the school districts challenged HEW's regulations, promulgated under Title IX, prohibiting discriminatory employment practices by educational institutions. Both Circuits affirmed the respective district courts in holding that Title IX does not embrace employment discrimination. We do not reach the issues in either case because our College did not attack the validity of HEW's regulations in the district court.

Order.

United States Court of Appeals, for the Ninth Circuit.

United States of America, Plaintiff-Appellee, v. El Camino Community College District and Stuart E. Marsee, Defendants-Appellants. No. 78-2720.

Filed: Aug. 9, 1979.

Before: CHAMBERS and HUFSTEDLER, Circuit Judges, and SOLOMON,* District Judge.

The petition for rehearing is denied.

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*Honorable Gus J. Solomon, Senior United States District Judge, District of Oregon, sitting by designation.

Order Staying Issuance of Mandate.

United States Court of Appeals, for the Ninth Circuit.

United States of America, Plaintiff/Appellee, vs. El Camino Community College District and Stuart E. Marsee, Defendants/Appellants. No. 78-2720, DC CV 77-4617 RMT.

Filed: Aug. 24, 1979.

Upon application of Leroy W. Blankenship, Esq. counsel for the Defendants-Appellants, and good cause appearing, IT IS ORDERED that the issuance, under Rule 41 (a) of the Federal Rules of Appellate Procedure, of the certified copy of the judgment of this Court in the above cause be and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the Defendants-Appellants herein, provided such petition is filed in the Clerk's Office of the Supreme Court of the United States on or before September 16, 1979.

In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

/s/ Shirley Hufstedler
United States Circuit Judge.
Judge Hufstedler

DATED: SAN FRANCISCO, CALIF.

Findings of Fact and Conclusions of Law.

United States District Court, Central District of California.

United States of America, Plaintiff, vs. El Camino Community College District, et al., Defendants. No. CV 77-4617-RMT.

Filed: July 26, 1978.

This is an action for injunctive and declaratory relief filed pursuant to Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, *et seq.*, by the United States of America. The case is before the court on a motion of the plaintiff for preliminary injunction and on a motion of the defendants to dismiss this action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, and alternatively, for summary judgment.

This matter was heard on February 24, 1978. The defendants' motion to dismiss, and alternatively, for summary judgment was heard as a motion for summary judgment. In addition, the counsel for the parties agreed at the hearing to consolidate the entire matter as a motion for summary judgment and as a matter for a permanent injunction and declaratory relief. Counsel agreed there was no genuine issue as to any material fact and that this matter presented only a question of law, to wit; whether the scope of authority of the Office for Civil Rights to investigate compliance with Title VI of the Civil Rights Act of 1964 is limited to investigation of the federally assisted programs or activities of a recipient of federal financial assistance.

The defendants' primary contention is that Title VI applies only to the federally assisted programs or activi-

ties and that the scope of investigative authority under Title VI is limited to the scope of authority to terminate federal financial assistance under Title VI. Defendants contend that the Office for Civil Rights is authorized to investigate the programs or activities for which defendant El Camino Community College District receives federal financial assistance through the Department of Health, Education and Welfare, but it is not authorized to investigate beyond the federally assisted programs or activities in order to determine whether the defendants or El Camino College are in compliance with Title VI.

The defendants further contend that the authority of the Office for Civil Rights to investigate the employment practices at El Camino College is limited to investigation of the employment practices in the federally assisted programs or activities where the primary objective of the federal financial assistance is to provide employment.

Another contention of the defendants is that the Office for Civil Rights exceeded the scope of its investigative authority under Title VI by not limiting its investigation to the federally assisted programs or activities.

After careful consideration of the motions, pleadings affidavits, exhibits, memoranda of points and authorities and the oral argument presented by counsel at the hearing, the court denies the defendants' motion for summary judgment, grants a permanent injunction and declaratory relief and makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The Office for Civil Rights (herein "OCR") of the United States Department of Health, Education, and Welfare (herein "HEW") is responsible for administering the provisions of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.*

2. Defendant El Camino Community College District (herein "District") is a public community college district organized and operated pursuant to the laws of the State of California.

3. The District operates one college, El Camino College (herein "ECC"), which is located in the City of Torrance, County of Los Angeles, State of California.

4. At all times material to this action, the District has been receiving, and continues to receive, federal financial assistance through HEW.

5. During the fiscal year July 1, 1976 to June 30, 1977, the annual budget of the District was $29,437,304 of which $1,838,313 was federal financial assistance received by the District from HEW. In the current fiscal year, July 1, 1977 to June 30, 1978, the annual budget of the District is $31,539,818 of which $1,121,883 is federal financial assistance received by the District from HEW.

6. Defendant Stuart E. Marsee (herein "Marsee") is the Superintendent of the District, President of ECC, and the person primarily responsible for implementing the rules, regulations, and policies of the District's Board of Trustees within ECC.

7. On February 3, 1965, Marsee executed on behalf of the District an "Assurance of Compliance with the Department of Health, Education and Welfare Regulation under Title VI of the Civil Rights Act of 1964."

8. According to the Affidavit of Marsee, at the time he executed the Assurance of Compliance and subsequent thereto, neither he nor the District intended to authorize OCR unlimited access to the employment and educational records of the District or of ECC concerning programs or activities for which no federal financial assistance was received or to enlarge the scope of the assurance to include non-federally funded programs or activities.

9. OCR received a complaint from the Council of Chicano Organizations on October 5, 1973 and other information alleging that ECC utilized discriminatory practices and procedures against Spanish-surnamed students in employment and delivery of educational services.

10. Beginning on June 18, 1974, a series of meetings and oral and written communications commenced between representatives of OCR and school officials of ECC for the purposes of investigating the charges of discrimination and determining whether the defendants are in compliance with Title VI and the HEW Regulation under Title VI, 45 C.F.R. Part 80.

11. The investigative attempts of OCR have consisted of requests to ECC to provide OCR access to certain data and information regarding ECC's employment practices and its practices and procedures in delivery of educational services to students.

12. Since June 18, 1974, the defendants have refused to voluntarily comply with OCR's request for data and information unless such request is limited to the programs or activities for which the District receives federal financial assistance through HEW.

13. The defendants' position on the matter of voluntary compliance with OCR's request has remained unchanged even though on June 4, 1975, OCR notified Marsee by letter that ECC's refusal to supply the requested data and information is in noncompliance with Title VI and that additional efforts would be made to secure voluntary compliance. Nevertheless, the defendants continued to refuse to voluntarily comply with OCR's request.

14. On May 27, 1977, OCR again notified Marsee by letter that ECC is in noncompliance with Title VI. The letter stated that OCR had determined under 45 C.F.R. §80.6(b) that ECC is not in compliance with Title VI, that OCR has exhausted the possibilities of securing compliance through informal conferences and other voluntary means, and that the matter would be referred to HEW's regional attorney with a request to initiate formal administrative enforcement proceedings against ECC.

15. On November 3, 1977, the Director of OCR notified Marsee by letter that the matter of ECC's noncompliance with Title VI would be referred to the United States Department of Justice for enforcement proceedings and that defendants would have ten days from the date of the letter to voluntarily comply with OCR's request.

16. As a result of defendants' continued failure and refusal to provide OCR with the requested information even after OCR's efforts to secure voluntary compliance pursuant to 45 C.F.R. §80.8, on December 12, 1977, plaintiff United States of America filed a complaint seeking an order from the court declaring that defendants' noncompliance with OCR's request violates Title VI, the HEW Regulation under Title VI and the Assurance of Compliance, and enjoining the defendants from refusing to permit OCR access

to the data and information which is pertinent and necessary to enable OCR to determine whether the defendants are in compliance with Title VI and the HEW Regulation under Title VI, 45 C.F.R. Part 80.

CONCLUSIONS OF LAW

1. This court has jurisdiction over the parties and the subject matter of this action pursuant to 28 U.S.C. §1345 and 42 U.S.C. §2000d, *et seq.*

2. Rule 12(b) of the Federal Rules of Civil Procedure provides that when a motion is made pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56 of the Federal Rules of Civil Procedure. In this action, the defendants made a motion pursuant to Rule 12(b)(6), the parties presented matters outside the pleadings which have not been excluded by the court, there is no genuine issue of material fact, and this matter presents a question of law. Therefore, the court treats the motion to dismiss as one for summary judgment.

In addition, the counsel for the parties agreed at the hearing to consolidate the entire matter as a motion for summary judgment and as a matter for a permanent injunction and declaratory relief since there is no genuine issue as to any material fact and this matter presents only a question of law.

3. As a recipient of federal financial assistance through HEW, the District is subject to Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, *et seq.*, and the HEW Regulation under Title VI, 45 C.F.R. Part 80.

4. Title VI prohibits discrimination on the basis of race, color, or national origin in any federally assisted program or activity. Section 601 of Title VI, 42 U.S.C. §2000d, provides:

> "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

5. In order to effectuate the remedial purpose of Title VI, the statute should be liberally construed. As stated in 3 Sutherland, *Statutes and Statutory Construction*, §72.05 at 392 (4th Ed. 1974), ". . . civil rights acts are remedial and should be liberally construed in order that their beneficent objectives may be realized to the fullest extent possible. To this end, courts favor broad and inclusive application of statutory language by which the coverage of legislation to protect and implement civil rights is defined." See *Bob Jones University v. Johnson*, 396 F. Supp. 597, 604 (D. S.C. 1974), *aff'd* 529 F.2d 514 (4th Cir. 1975).

Furthermore, the construction of a statute by the agency charged with its administration is entitled to be accorded great weight. *N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974); *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294, 315 (1933).

6. Section 602 of Title VI, 42 U.S.C. §2000d-1, provides HEW with the power to issue "rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken." See *Lau v. Nichols*, 414 U.S. 563, 567 (1974). This section also

provides that compliance with any requirement adopted pursuant to this section may be effected by termination of federal financial assistance proceedings or "by any other means authorized by law."

The regulations promulgated by HEW pursuant to Section 602 of Title VI are contained in 45 C.F.R. Part 80. The validity of these regulations is not at issue in this action as neither party has raised any constitutional or other challenges to the regulations.

7. The nature and scope of an OCR investigation of a recipient of federal financial assistance to determine whether the recipient is in compliance with Title VI may be determined by a complaint filed with OCR, but OCR is not limited to an investigation of the allegations in the complaint. According to 45 C.F.R. §80.7(c), OCR has the following investigative authority:

> "The responsible Department official or his designee will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part. The investigation should include, where appropriate, a review of the pertinent practices and policies of the recipient, the circumstances under which the possible noncompliance with the part occurred, and other factors relevant to a determination as to whether the recipient has failed to comply with this part."

In addition, 45 C.F.R. §80.7(a) directs OCR to conduct periodic compliance reviews of the practices of recipients to determine whether they are in compliance with 45 C.F.R. Part 80.

8. According to the pertinent parts of 45 C.F.R. §80.6, OCR is entitled to obtain the following information in order to determine whether a recipient of federal financial assistance is in compliance with Title VI:

> "(b) Compliance reports. Each recipient shall keep such records and submit to the responsible Department official or his designee timely, complete and accurate compliance reports at such times, and in such form and containing such information, as the responsible Department official or his designee may determine to be necessary to enable him to ascertain whether the recipient has complied or is complying with his part. . . ."
>
> "(c) Access to sources of information. Each recipient shall permit access by the responsible Department official or his designee during normal business hours to such of its books, records, accounts, and other sources of information, and its facilities as may be pertinent to ascertain compliance with this part."

Therefore, the HEW regulations provide OCR with the authority to seek and obtain information which is "pertinent to ascertain compliance" and to determine the amount and type of information that is necessary to enable OCR to ascertain whether a recipient is in compliance with Title VI and the HEW Regulation under Title VI, 45 C.F.R. Part 80.

9. The assurance of compliance, which is required with every application for federal financial assistance through HEW pursuant to 45 C.F.R. §80.4 and which was executed on February 3, 1965, by Marsee on behalf of the District, is not only applicable to the federally assisted programs or activities as the defend-

ants contend but is applicable to the entire institution unless the contrary is established in accordance with 45 C.F.R. §80.4(d)(2).

The relevant parts of 45 C.F.R. §80.4(d) provide:

> "(1) In the case of any application for Federal financial assistance to an institution of higher education (including assistance for construction, for research, for special training project, for student loans or for any other purpose), the assurance required by this section shall extend to admission practices and to all other practices relating to the treatment of students.
>
> "(2) The assurance required with respect to an institution of higher education . . . insofar as the assurance relates to the institution's practices with respect to admission or other treatment of individuals as students . . . or to the opportunity to participate in the provision of services or other benefits to such individuals, shall be applicable to the *entire* institution unless the applicant establishes, to the satisfaction of the responsible Department official, that the institution's practices in designated parts or programs of the institution will in no way affect its practices in the program of the institution for which Federal financial assistance is sought, or the beneficiaries of or participants in such programs." (Emphasis added).

The assurance of compliance executed by Marsee on behalf of the District provides that the District "AGREES THAT it will comply with Title VI of the Civil Rights Act of 1964 (P. L. 88-352) and all requirements imposed by or pursuant to the Regulation of the Department of Health, Education and Welfare (45 CFR Part 80) issued pursuant to that title . . ." and "GIVES ASSURANCE THAT it will immediately take any measures necessary to effectuate this agreement." The assurance also states that the "Applicant recognizes and agrees that such Federal financial assistance will be extended in reliance on the representations and agreement made in this assurance" and that the assurance is binding on the Applicant, the successors, transferees, and assignees, and the person or persons authorized to sign the assurance on behalf of the Applicant.

Since the terms of the assurance have not been challenged by any of the parties in this action and, as indicated by the Supreme Court in *Lau v. Nichols, supra,* at 569, "[t]he Federal Government has the power to fix the terms on which its money allotments to the States shall be disbursed," the defendants are contractually bound to permit OCR to conduct a Title VI investigation and the scope of OCR's *investigative authority* is not confined to investigation of the federally assisted programs or activities.

Therefore, a pinpoint approach, which requires federal administrative action to be conducted on a program by program basis and which has been applied to limit the *power to terminate* federal funding, is not appropriate in this matter.

10. Even if the pinpoint approach were applicable, it has not been applied as narrowly as defendants contend. The Fifth Circuit in *Board of Public Instruction of Taylor County, Florida v. Finch,* 414 F.2d 1068 (5th Cir. 1969), recognized that a determination to terminate federal funding due to discriminatory prac-

tices in a federally funded program cannot be made without consideration of its context and that a discriminatory practice in one part of an educational system may affect the other parts of the system. According to the court, "[I]n finding that a termination of funds under Title VI of the Civil Rights Act must be made on a program by program basis, we do not mean to indicate that a program must be considered in isolation from its context." The court further added that the administrative agency seeking to terminate federal funds must make findings of fact indicating either that a particular program "is itself administered in a discriminatory manner, or is so affected by discriminatory practices elsewhere in the school system that it thereby becomes discriminatory." 414 F.2d at 1078-1079.

The court also indicated that it is important to note that the purpose of limiting the termination power to "activities which are actually discriminatory or segregated" was not for the protection of the political entity whose funds might be terminated, but for the protection of the innocent beneficiaries of programs or activities not tainted by discriminatory practices. *Ibid.*, 414 F.2d at 1075. Thus, since the purpose of a Title VI investigation is to enable OCR to determine whether a recipient is in compliance with Title VI, to interpret the provisions of Title VI as limiting the scope of OCR's investigative authority to investigation of the federally assisted programs or activities would essentially preclude OCR from effectively discovering and determining whether the defendants herein are in compliance with Title VI and from protecting the beneficiaries of the federally assisted programs or activities even if there was rampant discrimination elsewhere

in the college and such discriminatory practices were affecting the federally assisted programs or activities. The distinction between the authority to investigate and the power to terminate should not be lost.

11. Furthermore, OCR has the authority to investigate ECC's employment practices to determine whether there is discrimination on the ground of race, color, or national origin in the employment practices which affect the students at the college. Section 604 of Title VI, 42 U.S.C. §2000d-3, provides that administrative action is not authorized with respect to employment practices except where the primary objective of the federal financial assistance is to provide employment. However, an exception to the provisions of Section 604 of Title VI is contained in 45 C.F.R. §80.3 (c)(3). 45 C.F.R. §80.3(c)(3) provides:

> "Where a primary objective of the Federal financial assistance is not to provide employment, but discrimination on the ground of race, color, or national origin in the employment practices of the recipient or other persons subject to the regulations tends, on the ground of race, color, or national origin, to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program to which this regulation applies, the foregoing provisions of this paragraph (c) shall apply to the employment practices of the recipient or other persons subject to the regulation, to the extent necessary to assure equality of opportunity to, and nondiscriminatory treatment of, beneficiaries."

The court in *United States v. Frazer,* 297 F.Supp. 319, 322 (M.D. Ala. 1968), stated the following regarding Section 604 of Title VI:

> "It is true that §604 of Title VI makes it clear that Title VI was not intended to be applicable to the employment practices of recipients of Federal assistance 'except where a primary objective of the Federal assistance is to provide employment' or where discrimination in employment causes discrimination to the beneficiaries [citation omitted]. However, the language of §604 of Title VI also clearly reflects that that section was not intended to detract from any authority that Federal officials might have under other provisions of the law."

The court then concluded that Title VI does not preempt or limit the authority that federal officials have to take affirmative action, including the filing of civil actions, designed to reduce or eliminate racial discrimination.

12. Marsee's assertion that some of the information requested by OCR is confidential is unsubstantiated. The issue of confidentiality is addressed in 45 C.F.R. §80.6(c) as follows:

> "Asserted considerations of privacy or confidentiality may not operate to bar the Department from evaluating or seeking to enforce compliance with this Part. Information of a confidential nature obtained in connection with compliance evaluation or enforcement shall not be disclosed except where necessary in formal enforcement proceedings or where otherwise required by law."

Therefore, the assertion of confidentiality by Marsee may not operate to bar OCR representatives from conducting a Title VI investigation of the defendants.

13. OCR is authorized to seek judicial enforcement of Title VI pursuant to §602 of Title VI, 45 C.F.R. §80.8, and the Assurance of Compliance executed by Marsee on behalf of the District which provides that "the United States shall have the right to seek judicial enforcement of this assurance."

14. Furthermore, the court cannot say that HEW or OCR has clearly exceeded its powers or authority or acted contrary to the statute.

15. The defendants' motion for summary judgment is denied on the ground that the defendants have not shown that they are entitled to a judgment as a matter of law.

16. The injunctive and declaratory relief sought by plaintiff is granted. With respect to the balancing of hardships to determine whether the court should issue the permanent injunction, defendants have only made general allegations of burden. Such allegations lack the requisite specificity. The court finds that without the issuance of an order in favor of the plaintiff, the plaintiff would be irreparably injured because the defendants would continue to violate Title VI, the HEW Regulation under Title VI, and the Assurance of Compliance by refusing to comply with OCR's request for data and information which is pertinent to enable OCR to determine whether the defendants are in compliance with Title VI. Without the issuance of such an order, OCR would also be prevented from investigating the allegations that ECC utilized discriminatory practices and procedures against Spanish-surnamed stu-

dents in employment and the delivery of educational services and hindered in its administration of Title VI. Therefore, the balance is clearly in favor of the plaintiff. The issuance of the permanent injunction is promotive of the public good.

Dated: July 26, 1978.

/s/ Robert M. Takasugi
ROBERT M. TAKASUGI
UNITED STATES DISTRICT JUDGE

Judgment.

United States District Court, Central District of California.

United States of America, Plaintiffs, vs. El Camino Community College District, et al., Defendants. No. CV77-4617-RMT.

Filed: July 26, 1978.

For the reasons set forth in the court's Findings of Fact and Conclusions of Law, entered in this case on this date, it is ORDERED, ADJUDGED AND DECREED:

1. That the failure and refusal of the defendants to grant the Department of Health, Education, and Welfare, Office for Civil Rights, access to information and data concerning El Camino College's employment practices and its practices and procedures in the delivery of educational services to students in order for OCR to determine whether the defendants are in compliance with Title VI is in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §200d [*sic*], *et seq*, the HEW Regulation under Title VI, 45 C.F.R. Part 80, and the Assurance of Compliance executed on February 3, 1965, by defendant Stuart E. Marsee on behalf of defendant El Camino Community College District; and

2. The defendants, El Camino Community College District and Stuart E. Marsee, and their successors in office, agents, employees, and all persons in active concert and participation with them are permanently enjoined from refusing to permit the responsible officials of the Department of Health, Education, and Welfare, Office for Civil Rights, access during the regular business hours to the premises, records, school personnel

and other sources of information which they may request for the purpose of investigating and determining whether the defendants are in compliance with Title VI as required by the HEW Regulation under Title VI, 45 C.F.R. Part 80.

Dated: July 26, 1978.

/s/ Robert M. Takasugi
ROBERT M. TAKASUGI
UNITED STATES DISTRICT JUDGE

Assurance of Compliance With the Department of Health, Education, and Welfare Regulation Under Title VI of the Civil Rights Act of 1964.

El Camino Junior College District (hereinafter called the "Applicant") HEREBY AGREES THAT it will comply with title VI of the Civil Rights Act of 1964 (P.L. 88-352) and all requirements imposed by or pursuant to the Regulation of the Department of Health, Education, and Welfare (45 CFR Part 80) issued pursuant to that title, to the end that, in accordance with title VI of that Act and the Regulation, no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity for which the Applicant receives Federal financial assistance from the Department; and HEREBY GIVES ASSURANCE THAT it will immediately take any measures necessary to effectuate this agreement.

If any real property or structure thereon is provided or improved with the aid of Federal financial assistance extended to the Applicant by the Department, this assurance shall obligate the Applicant, or in the case of any transfer of such property, any transferee, for the period during which the real property or structure is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits. If any personal property is so provided, this assurance shall obligate the Applicant for the period during which it retains ownership or possession of the property. In all other cases, this assurance shall obligate the Applicant for the period during which the Federal financial assistance is extended to it by the Department.

THIS ASSURANCE is given in consideration of and for the purpose of obtaining any and all Federal grants, loans, contracts, property, discounts or other Federal financial assistance extended after the date hereof to the Applicant by the Department, including installment payments after such date on account of applications for Federal financial assistance which were approved before such date. The Applicant recognizes and agrees that such Federal financial assistance will be extended in reliance on the representations and agreements made in this assurance, and that the United States shall have the right to seek judicial enforcement of this assurance. This assurance is binding on the Applicant, its successors, transferees, and assignees, and the person or persons whose signatures appear below are authorized to sign this assurance on behalf of the Applicant.

Dated February 3, 1965.

EL CAMINO JUNIOR COLLEGE
DISTRICT
(Applicant)

By Stuart E. Marsee
(President, authorized official)

El Camino College

El Camino College, California 90506

Department of Health, Education, and Welfare
Regional Office
760 Market Street, Room 700
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April 1, 1975

Telephone (415) 556-8780

Dr. Stuart E. Marsee
President
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Torrance, California 90506

Dr. President Marsee:

The Office for Civil Rights (OCR) of the Department of Health, Education and Welfare administers Title VI of the Civil Rights Act of 1964, as well as other civil rights provisions prohibiting discrimination on the basis of race, color, religion, sex or national origin. The jurisdiction of the Higher Education Branch of OCR is limited to higher educational institutions receiving Federal financial assistance. El Camino College is a recipient of Federal financial assistance and is therefore subject to the jurisdiction of OCR. Moreover, on February 3, 1965, El Camino College executed an Assurance of Compliance with the HEW Regulation under Title VI. (Copy enclosed) This Assurance has served as the basis for the award of all Federal financial assistance to the College subsequent to its execution.

On December 10, 1974, OCR formally requested El Camino College to provide this Office with pertinent information regarding employment and the delivery of educational services to students in order to facilitate an investigation of the complaint filed by the Council

of Chicano Organizations against El Camino College. A copy of the complaint was forwarded to you on June 13, 1974.

As I will indicate below, this Office has, to the fullest extent possible, attempted to secure the cooperation of El Camino College in complying voluntarily with the provisions of the Act and implementing Regulation.

On December 17, 1974, Waite Madison, Chief of the Higher Education Branch, and two members of his staff, Earl Miller and Lila Lee, met with officials at El Camino College which included: Dr. Wallace Cohen, Vice-President—Instruction; Dr. C.W. Stine, Vice-President—Business; Mr. Merl Sloan, Vice-President—Student Personnel; Ms. Kathryn Schwarz, Dean of Personnel Administration. The meeting consisted of a discussion of the following areas:

1. OCR's responsibility under Title VI of the Civil Rights Act of 1964 as it relates to the complaint filed against El Camino College.
2. The enforcement parameters of OCR including interpretations of various aspects of Title VI which were unclear to members of your staff.
3. The apparent lack of jurisdiction over El Camino College under Executive Order 11246 because the institution does not participate in Federal contracts.
4. The process of an on-site review resulting in a final report to OCR in Washington, D.C. for concurrence.

On January 28, 1975, Mr. Madison, Mr. Miller and Ms. Lee met with you, Mr. Donovan Main, of the County Council's [*sic*] Office and the same members of

your staff that participated in the December 17, 1974, meeting.

The central issue at this meeting was the extent of OCR's jurisdiction over El Camino College. The position of the College as stated by Mr. Main is that OCR does not have the authority to undertake a comprehensive investigation of the college. He contended that Title VI limits our jurisdiction only to those programs receiving Federal funds.

You were advised by my staff as follows:

1. Title VI does not limit the jurisdiction of OCR to Federally assisted programs only but encompasses all programs relating to treatment and delivery of services to students which includes employment practices to the extent necessary to ensure equality of opportunity to, and nondiscriminatory treatment of students.
2. The scope of an OCR investigation is not limited to the charges in a complaint but can be enlarged to include any areas related to the provision of services or other benefits to students.
3. OCR has the compliance responsibility for all higher education institutions receiving Federal funds and routine compliance reviews may be conducted when no complaint has been flied.

My staff provided you and Mr. Main with copies of the Title VI Regulation for review. It was agreed that the Regulation would be reviewed by Mr. Main and the position of El Camino College would be communicated to this Office no later than February 5, 1975.

In a telephone conversation with Mr. Miller on February 14, 1975, Mr. Main reaffirmed his original position

that he was advising the College not to cooperate with OCR and to refuse to provide the requested material.

In a further effort to render assistance and guidance to El Camino College in complying voluntarily with the provisions of Title VI and the Regulation, I would like to bring to your attention the following sections of the Regulation (copy enclosed): (underlining ours)

Sec. 80.4 (d) Assurance from institutions

(1) In the case of any application for Federal financial assistance to an institution of higher education (including assistance for construction, research, special training project, student loans or for any other purpose), *the assurance required by this section shall extend to admission practices and to all other practices relating to the treatment of students.*

(2) The assurance required with respect to an institution of higher education . . . insofar as the assurance relates to the institution's practices with respect to admission or other treatment of individuals as students . . . or to the opportunity to participate in the provision of services or other benefits to such individuals as students . . . or to the opportunity to participate in the provision of services or other benefits to such individuals, shall be applicable to the *entire* institution . . .

Sec. 80.6 (c) "Access to sources of information."

Each recipient shall permit access by the responsible Department official . . . to such of its books, records, accounts, and other sources of information and its facilities as may be pertinent to ascertain compliance with this part.

Section 604 of Title VI specifically exempts from coverage the employment practices of recipients, except where a primary objective of the Federal financial assistance is to provide employment. However, Section 601 covers employment practices of recipients when discrimination against the recipient's employees or applicants for employment has as its effect discrimination against the beneficiaries of Federal financial assistance. Title VI, therefore, covers employment of faculty and administrative staff working directly with students. See Section 80.3 (c) (e).

I am, once again, requesting that El Camino College provide the following information within thirty (30) days after the receipt of this letter.

I. Employment

1. A work force array of all employees, broken down by racial/ethnic background, sex and status (full-time or part-time) for the last three years. Identify each position by title and department and distinguish between faculty and staff. Classify this data according to each academic year.
2. A breakdown by racial/ethnic background, sex and status for all new hires and separations for the last three years.

II. Educational Services

1. A breakdown by racial/ethnic background and sex of the student body for the last three years.
2. A description of the College's recruitment area.
3. Recruitment schedules for the last three years including a list of the high schools visited and each school's racial profile. (This may be indicated by stating whether it is predominantly Black, Chicano, Asian, or Anglo)

4. The name, title, racial/ethnic identification and sex of the person(s) responsible for the student recruitment.
5. Provide the policies and a brief description of all formal and informal programs designed to retain and assist students throughout the completion of their academic careers. Provide a statement of purpose for each such program.
6. The number, broken down by racial/ethnic background, sex, and title of those on the curriculum design committee or advisory group.
7. List the name and type of financial aid available to students.
8. The total amount of aid awarded and a breakdown by racial/ethnic background and sex of applicants who were awarded financial aid for the last three years. Categorize this information by academic year and give the type of financial aid and the amount awarded to each student.

Failure to comply with this request will result in this Office referring the records of El Camino College to the OCR Headquarters in Washington, D.C. to initiate enforcement proceeding in accordance with Sec. 80.8 of the Regulation.

If you have any questions do not hesitate to contact me.

Sincerely,

/s/Floyd L. Pierce
Floyd L. Pierce
Director, Office for Civil Rights
Region X

Encl.

No. 79-432

DEC 8 1979

In the Supreme Court of the United States

OCTOBER TERM, 1979

EL CAMINO COMMUNITY COLLEGE DISTRICT AND STUART E. MARSEE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is reported at 600 F. 2d 1258. The opinion of the district court is reported at 454 F. Supp. 825.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 1979. A timely petition for rehearing was denied on August 9, 1979. The petition for a writ of certiorari was filed on September 15, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in investigating a possible violation of Title VI of the Civil Rights Act of 1964 by an educational institution, the Department of Health, Education, and Welfare may seek information about activities not directly supported by federal financial assistance in order to determine whether the institution's conduct of those activities impermissibly discriminates among existing or prospective beneficiaries of the programs that are funded by federal grants.

STATEMENT

Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin in programs or activities receiving federal financial assistance. 42 U.S.C. 2000d *et seq.*; 45 C.F.R. 80.3. This dispute concerns the scope of the investigative authority of the Department of Health, Education, and Welfare (HEW) in determining whether a recipient of federal assistance is discriminating impermissibly against current or prospective participants in federally funded programs.

In 1973, HEW received a complaint that El Camino Community College was discriminating, in both its educational and employment practices, against Spanish-surnamed persons. HEW asked El Camino to provide information about the composition of its student body, recruitment and financial aid practices, and programs for the provision of academic assistance to students. It also requested information about hiring practices. El Camino acknowledged that it was a recipient of federal financial assistance within the meaning of Title VI, but refused to submit information about any programs and practices that were not themselves supported by federal funds.

After further unsuccessful attempts to obtain the requested information, HEW referred the matter to the Department of Justice for enforcement. 42 U.S.C. 2000d-1; 45 C.F.R. 80.8(a)(1). On December 12, 1977, the United States filed this suit in the United States District Court for the Central District of California. The government sought an injunction requiring El Camino to provide the information requested by HEW.

The district court held (Pet. App. 31a) that El Camino's refusal to provide the information violated Title VI, HEW's regulations implementing Title VI, and the Assurance of Compliance form (*id.* at 33a-34a) that El Camino signed as a precondition to receipt of federal funds. The court enjoined El Camino from continuing to refuse HEW access to the requested information. The district court rejected El Camino's claim that HEW's investigative authority extended only to information about programs themselves supported by federal funds. The court held that El Camino had contracted with HEW to permit broader access (*id.* at 23a-25a), and that, in any event, HEW had authority to determine whether discrimination in programs not supported by federal funds resulted in illegal discrimination against student beneficiaries of federal assistance (*id.* at 25a-28a).

The court of appeals affirmed (Pet. App. 7a-12a). The court ruled that El Camino had agreed to comply with HEW regulations authorizing the agency to review any records of the college bearing on practices that might have a discriminatory impact on the intended beneficiaries of federally funded programs (*id.* at 7a-10a). Without explicitly ruling on the validity of HEW's regulations under Title VI, a question not raised by petitioners in the district court (*id.* at 8a, 22a), the court stated that "[i]n exercising its investigatory powers, as

distinguished from its regulatory or remedial powers. HEW must have substantial latitude in scrutinizing policies and practices of the institution that may have a discriminatory impact on the intended beneficiaries of [federal] assistance" (*id.* at 10a).

ARGUMENT

The court of appeals has decided only that petitioners must comply with their contractual agreement to allow HEW access to records concerning practices of the college that may operate to discriminate against beneficiaries of federal financial assistance. The decision correctly recognizes that HEW's regulations and El Camino's Assurance of Compliance contemplate agency access to records of programs and activities that do not directly receive federal funding but that may be conducted in such a way as to produce a discriminatory effect within the federally funded program itself. This unremarkable proposition does not merit further review.

Notwithstanding the phrasing of petitioners' questions presented, the case in its current posture does not present any issue regarding the validity of HEW's regulations. Much less does it present any question concerning HEW's authority to withhold federal funds or to regulate unfunded activities at a recipient institution. The sole question decided by the lower courts involves HEW's authority to request information under its regulations and its contractual agreement with petitioners. The court of appeals' decision on this matter is correct and unexceptional. It does not conflict with the ruling of any other circuit and review by this Court is not warranted.

1. The Assurance of Compliance signed by El Camino as a precondition to receiving federal funds states specifically that "El Camino Junior College District * * *

HEREBY AGREES THAT it will comply with title VI * * * and all requirements imposed by or pursuant to the Regulation of the Department of Health, Education, and Welfare (45 CFR Part 80)" (Pet. App. 33a). The regulations with which El Camino promised to comply require a fund recipient to give HEW "such information, as the responsible Department official or his designee may determine to be necessary to enable him to ascertain whether the recipient has complied or is complying with this part." 45 C.F.R. 80.6(b).

45 C.F.R. 80.4(d)(2) states:

> (d) *Assurance from institutions.*
>
> (1) In the case of any application for Federal financial assistance to an institution of higher education (including assistance for construction, for research, for special training project, for student loans or for any other purpose), the assurance required by this section shall extend to admission practices and to all other practices relating to the treatment of students.
>
> (2) The assurance required with respect to an institution of higher education, hospital, or any other institution, insofar as the assurance relates to the institution's practices with respect to admission or other treatment of individuals as students, patients, or clients of the institution or to the opportunity to participate in the provision of services or other benefits to such individuals, shall be applicable to the entire institution unless the applicant establishes, to the satisfaction of the responsible Department official, that the institution's practices in designated parts or programs of the institution will in no way affect its practices in the

> program of the institution for which Federal financial assistance is sought, or the beneficiaries of or participants in such program. * * *

45 C.F.R. 80.3(c)(3) states that "[w]here a primary objective of the Federal financial assistance is not to provide employment," but where discrimination in employment may tend to result in illegal discrimination against participants in the federally funded program, such employment discrimination is prohibited "to the extent necessary to assure equality of opportunity to, and nondiscriminatory treatment of, beneficiaries."

This Court has held that Congress has the authority to fix the terms under which it will grant federal funds and that the government has the power to enforce assurances for which it has contracted. *Lau* v. *Nichols*, 414 U.S. 563, 569 (1974); *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 127 (1940). The court of appeals' decision merely requires El Camino to live up to its contractual obligation.

2. Even absent the contractual assurances, the lower court's decision rests on firm ground. It is the statutory responsibility of HEW, as the agency providing financial assistance, to insure that the assistance is utilized in a manner free of prohibited discrimination. 42 U.S.C. 2000d-1. To carry out this responsibility, the court of appeals found, HEW must have the authority to investigate whether any policies or practices of a recipient have the prohibited effect on beneficiaries of federal assistance. See also *Caulfield* v. *Board of Education of the City of New York*, 583 F. 2d 605 (2d Cir. 1978); *Board of Public Instruction of Taylor County, Florida* v. *Finch*, 414 F. 2d 1068, 1078-1079 (5th Cir. 1969).

As the court of appeals noted, the narrow interpretation of HEW's investigative authority advanced by El Camino could prevent HEW from discovering general patterns of discrimination not aimed solely at federally assisted programs. The court offered the following example (Pet. App. 10a-11a):

> [I]f the institution received federal funds under the National Direct Student Loan Program and made these benefits available on an equal basis to all of its students, but the institution refused to admit Spanish surnamed students, potential beneficiaries of the federally funded program would have been denied benefits on the basis of their race [or national origin]. An investigation solely of the administration of the loan program would not reveal the violation.[1]

The lower court's opinion is consistent with decisions of this Court regarding the investigative authority of administrative agencies. Agencies with investigative authority, the Court has held, are entitled to obtain all evidence "not plainly incompetent or irrelevant to any

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[1]The record does not indicate which requested information petitioners believe is related solely to programs not receiving federal financial assistance. Petitioners' apparent desire is that HEW's investigative authority not reach activities not paid for with federal money. Without a thorough investigation, however, it is not always possible to determine which practices are part of a program that receives federal assistance. For example, where assistance is provided to students enrolled in the school, admissions practices may be considered part of the program that is federally assisted. For purposes of this case, however, the precise scope of the "program or activity receiving federal financial assistance" need not be determined, because the key regulation at issue, 45 C.F.R. 80.4(d)(2), does not make the agency's investigative authority directly dependent on that factor.

lawful purpose of the [agency] in the discharge of [its statutory] duties." *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 509 (1943). See also *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652 (1950); *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964). In sustaining HEW's request for access to El Camino's records, therefore, the court of appeals merely applied the accepted principle that the agency's power to investigate must be broader than its power to regulate in order to permit the agency to obtain all the information necessary to determine whether substantive violations have occurred. *Endicott Johnson*, *supra*, 317 U.S. at 508-509; *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 198-201 (1946); *SEC* v. *Brigadoon Scotch Dist. Co.*, 480 F. 2d 1047 (2d Cir. 1973), cert. denied, 415 U.S. 915 (1974).

3. Contrary to petitioners' assertion (Pet. 11-13), the court of appeals' decision in this case does not conflict with decisions of other courts of appeals interpreting HEW's authority under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.* Those cases involved an altogether different issue. The cases cited by petitioners did not concern the scope of HEW's investigative authority but addressed only the question whether HEW's regulatory authority under Title IX of the Education Amendments of 1972 allows the agency to issue regulations prohibiting sex discrimination in the employment practices of educational institutions receiving federal financial assistance. See *Islesboro School Committee* v. *Califano*, 593 F. 2d 424 (1st Cir.), cert. denied, No. 79-200 (Nov. 26, 1979); *Junior College District of St. Louis* v. *Califano*, 597 F. 2d 119 (8th Cir.), cert. denied, No. 79-201 (Nov. 26, 1979); and *Romeo Community Schools* v. *United States Department of Health, Education and Welfare*, 600 F. 2d 581

(6th Cir.), cert. denied, No. 79-442 (Nov. 26, 1979). All three cases held that Title IX does not authorize HEW to prohibit employment discrimination except where a primary objective of federal financial assistance is to provide employment. The decisions did not question, however, that discriminatory employment practices could be reached if they operated to discriminate illegally against beneficiaries of federally funded programs. The courts of appeals simply held that HEW had shown no "nexus" between the employment practices prohibited by the challenged Title IX regulations and the possible effects of those prohibited practices on the student beneficiaries of federally funded programs. See *Islesboro*, *supra*, 593 F. 2d at 430; *Junior College District of St. Louis*, *supra*, 597 F. 2d at 121; *Romeo Community Schools*, *supra*, 600 F. 2d at 585 (adopting the court of appeals' decision in *Islesboro*). None of the cases raised any question about whether HEW could properly request information about possible employment discrimination where that discrimination might have an effect on the beneficiaries of a federally funded program.[2]

4. Petitioners argue (Pet. 9-10) that the investigative efforts of HEW impose costly and time consuming burdens on the college and that therefore certiorari should be granted. The response to this contention is twofold. In the first place, El Camino's challenge to HEW's investigative request involved solely the scope of the agency's investigative authority, not the burden or cost an authorized investigation might impose. Second,

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[2]The court of appeals in the present case noted that, although HEW's regulations (45 C.F.R. 80.4(d)) specifically permit a recipient to show that practices about which information was requested could not affect federally funded programs, petitioners did not attempt to make such a showing (Pet. App. 10a).

and more important, the court of appeals correctly observed (Pet. App. 11a) that petitioners' claim of administrative burden "cannot excuse the College for its failure to comply with the regulations that it accepted in obtaining federal funding * * *." Review by this Court is not justified in order to help petitioners avoid their obligation to gather and produce adequate information in response to HEW's request.

El Camino also suggests (Pet. 7, 11) that this case involves a governmental assertion of power to "regulate" the college's educational practices. This allegation is baseless. HEW has taken no action to affect El Camino's federal funds; it has merely attempted to conduct an investigation to determine whether further proceedings are warranted. Any challenge to the scope of future action concerning El Camino's eligibility for continued funding must await such action. *Myers* v. *Bethlehem Corp.*, 303 U.S. 41, 51 (1938). There is simply no issue of regulatory authority now before this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

DREW S. DAYS, III
Assistant Attorney General

JESSICA DUNSAY SILVER
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Attorneys

DECEMBER 1979

DOJ-1979-12